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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1995

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No. 94-1511

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SAMUEL LEWIS, *et al.*,

*Petitioners,*

v.

FLETCHER CASEY, JR., *et al.*,

*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE*,  
LEGAL AID BUREAU, INC.,  
IN SUPPORT OF RESPONDENTS

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**INTEREST OF *AMICUS CURIAE*\***

The Legal Aid Bureau, Inc., (hereinafter the "Bureau") is filing this *amicus curiae* brief in support of the position of the Respondents because it believes that Maryland's experience in providing prisoner access to the courts through a staffed legal services program should be considered by the Court when addressing the questions presented in this case.

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\* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3

The Bureau, a non-profit legal services program with offices throughout Maryland, has been in existence for over 80 years. The Bureau established its prisoner legal services unit in the early 1970's in response to an unmet need of state prisoners for civil legal services. Shortly after the Court's ruling in *Bounds v. Smith*, 430 U.S. 817 (1978), Judge Frank A. Kaufman of the United States District Court for the District of Maryland ruled, with the concurrence of the Maryland Attorney General and other officials, that for Maryland prisoners meaningful access to courts would best be obtained with the assistance of persons trained in the law. *Carter v. Kamka*, 515 F. Supp. 815 (D. Md. 1980). The Bureau remains as counsel for the plaintiff class in *Carter*. As the number of prisoners has increased from just a few thousand to the present population of approximately 21,300, the work of the Bureau's Prisoner Assistance Project ("PAP") has grown and diversified in keeping with changes in the prison population and prison law.

Through the years PAP has been instrumental in bringing about changes in Maryland's prisons which have made them safer and more humane, in clarifying the rights of prisoners and prison officials, in helping ignorant, illiterate and mentally disabled prisoners bring their legal problems to the attention of the courts, in negotiating with prison officials for relief of prisoner problems, and in helping prisoners understand and accept the laws and regulations under which they must function.

PAP's services have proved to be important not only to the prisoner clients but also to the state and the communities to which they ultimately return with a better sense of the just

and proper use of the law. The Bureau files this *amicus* brief in the hope that such services will be expanded to meet the changing and growing needs of the prisoner population.

## INTRODUCTION

Maryland has in its custody approximately 21,300 prisoners in 24 facilities, several half-way houses, the Baltimore City Detention Center and home detention program, and temporarily in several local jails.<sup>1</sup> Daily Population Report for September 25, 1995. This number of prisoners closely approximates that of Arizona, which is currently 22,000. Pet. Brief at 3.

Approximately 20% of Maryland's inmates read below a third grade level, a figure which includes mentally disabled inmates and a majority of the deaf inmates. The average literacy rate for inmates received into the Maryland correctional system during the period January to July 1995 was below the nationally recognized standard for literacy of the eighth grade.<sup>2</sup> Of the total prison population, at least 85% have not graduated from high school. Educational

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<sup>1</sup> The Maryland Department of Public Safety and Correction (hereinafter "the Department") operates the Maryland Division of Correction ("MDOC") and Patuxent Institution for state prisoners who have been committed to the custody of the Commissioner of Correction, primarily those sentenced to terms of twelve months or more. Patuxent Institution operates directly under the Department to provide a therapeutic program pursuant to Md. Ann. Code, Art. 31B (1957, 1993 Repl. Vol. and 1995 Supp.), and a mental health facility for prisoners.

<sup>2</sup> This figure is derived from the Test of Adult Basic Education (TABE), a national standardized test administered to all incoming Maryland inmates.

Coordinating Council for Correctional Institutions 1995 Report. The inability of this educationally disadvantaged population to fend for itself in state and federal courts is axiomatic and is made crueler by the fact that the prisoner litigator is almost always opposed by the Maryland Attorney General's Office, with approximately 15 attorneys permanently assigned to MDOC matters and additional litigation specialists available for special assignment. Likewise, private law firms represent MDOC medical contractors when prisoners litigate medical claims.

MDOC inmates gain access to the courts through a combination of services. Maryland's Public Defender provides representation in criminal trials, appeals, parole revocation hearings, and at hearings on certain post-conviction petitions. Library Assistance to State Institutions ("LASI") mails to prisoners copies of cases which they request.<sup>3</sup> PAP is the primary source of civil legal assistance to Maryland prisoners.<sup>4</sup> PAP provides legal research, gives legal opinions and advice, investigates claims, prepares pleadings and other legal documents, negotiates with MDOC and medical personnel for settlement of prisoners' legal problems and in some cases represents prisoners, primarily in their civil rights and constitutional claims. PAP also prepares manuals on a variety of legal topics to assist prisoners in understanding the law and using the legal process applicable

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<sup>3</sup> In order to obtain a copy of a particular decision, the prisoner must be able to provide a correct citation.

<sup>4</sup> PAP has a staff of seven attorneys, a law graduate, and seven legal assistants.

to their problems. No MDOC institutions have more than a rudimentary law library. Nine MDOC facilities have general libraries with limited legal materials. Correctional Education Libraries Required Reference List. It is through the combination of these services that Maryland meets its constitutional obligations under *Bounds v. Smith*, 430 U.S. 817 (1977); *Hall v. Maryland*, 433 F. Supp. 756 (D.Md. 1977), *modified and aff'd sub nom. Carter v. Mandel*, 573 F.2d 172 (4th Cir. 1978), *on remand Carter v. Kamka*, 515 F. Supp. 825 (D.Md.1980), to assure that prisoners have meaningful access to the courts.

Prisoners as individuals have the same range of legal problems as persons who are not incarcerated, as well as problems unique to incarceration. In 1994 PAP received nearly 3,000 requests for assistance. Of these, 259 requests concerned problems not related to incarceration; the remainder were endemic to or arose out of imprisonment. The non-incarceration issues ranged from adoption to worker's compensation, from divorce to bankruptcy.<sup>5</sup> Responding to these requests, PAP provided meaningful and effective access to courts, as well as the bases for informed decisions not to file court proceedings. Such services are not provided by law libraries or persons untrained in the law.

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<sup>5</sup> PAP also acts as a gatekeeper. Of the 2,422 files which it closed in 1994, 99 were closed because investigation and research had shown that the case was without merit.

Even assuming that Maryland could afford to maintain a law library in every prison,<sup>6</sup> not all prisoners would have access. Currently, prisoners on segregation are not permitted to use existing libraries for security reasons. Although they may obtain some books from the library by submitting a request to the librarian, legal materials are normally designated as "reference" books and may not be checked out. Prisoners at Maryland's highest security prison, the Maryland Correctional Adjustment Center ("Supermax"), are not allowed to have any contact with other prisoners. This means that a schedule would need to be worked out so that each of the 220 Supermax prisoners would be allowed sufficient time in the library to do research and prepare pleadings. Supermax prisoners are able to contact PAP for legal assistance despite their isolation.

### SUMMARY OF ARGUMENT

Without the availability of lawyers and trained legal assistants, the right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1978), remains unobtainable to the vast majority of prisoners as a result of their illiteracy or functional illiteracy, mental disability, deafness, and restrictions on their liberty. Nor does offering prisoners with these limitations a law library without trained legal assistance to navigate the shelves and the law provide them meaningful access to the courts. Maryland's experience in meeting the

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<sup>6</sup> In Maryland, this would be neither cost effective nor fair. Three MDOC facilities hold less than 200 prisoners. Another four hold between 200 and 500. The largest facility holds over 2800. Prisoners in the smaller facilities would be able to spend much more time in the library on the average than those in the larger facilities.

decree of *Bounds* relies on a combination of services, the principle component of which is the PAP with its staff of lawyers and legal assistants, as Maryland does not maintain law libraries in its prisons.

1. *Pro se* prisoner litigants in Maryland face an arduous task before being able to reach a court with their claims. Exhaustion of administrative remedies requires a multi-tiered, time-consuming process leading eventually to an administrative hearing. Other requirements may include filing claims with the State Treasurer and the Health Claims Arbitration Office. After sorting through these administrative remedies and each of their separate time requirements, prisoners must then determine where to file their legal action. These varied legal requirements create extensive hurdles for Maryland prisoners for which they must turn to knowledgeable legal practitioners for adequate advice prior to filing a civil action in federal or state court or determining not to file.

2. Computation of prisoners' sentences, credits for time served, good time credits and parole eligibility raise complex legal issues for which access to trained legal personnel is essential. Beside reliance on case law, prisoners must have access to manuals, handbooks and instructions, many of which are dense and lengthy and, often, not available to prisoners.

3. Petitioners' claim that a prisoner's access to courts to resolve legal claims is protected by liberal pleading standards and appointment of counsel by the courts does not withstand the scrutiny of actual Maryland experience. Maryland state courts do not appoint counsel as they lack authority to do so.

Maryland courts also hold *pro se* litigants to the same procedural and substantive standards as parties represented by attorneys.

4. Varied resources are available in Maryland for residents with legal problems including general and specialized legal services offices, court clerks providing forms and filing instructions, *pro se* courses, advice telephone hotlines and *pro bono* programs. However, those resources are usually not available to prisoners because of their incarceration and inability to contact those resources. This actual disparity of legal assistance in Maryland disproves Petitioners' unsubstantiated claim that the ordered relief in the district court would provide prisoners "access that far exceeds that available to ordinary residents. . . ." Without PAP, Maryland's prisoners would not have meaningful access to the courts and clearly would be at a disadvantage as compared to non-incarcerated "ordinary residents."

### ARGUMENT

#### **I. Navigating Exhaustion Requirements Is An Arduous Task That Illiterate and Ignorant Prisoners Would Be Unable To Accomplish Without Legal Assistance.**

For Maryland prisoners the questions that must be answered before filing suit are: whether to file, what to file, where to file, when to file, how to file and what to do before filing. The answers to these questions are often extremely complicated and will vary from case to case. For maximum benefit of both prisoners and courts, these decisions must be based on the advice of legally trained persons familiar with federal and Maryland law and MDOC procedures.

Accordingly, even where access to courts is not directly impeded, prisoners who seek the aid of courts and administrative agencies face difficult and often insurmountable barriers before obtaining a review of the merits of their claims. Before filing a civil rights action under 42 U.S.C. §1983 in either federal or state court, MDOC prisoners must first determine whether their problems are subject to the prison administrative remedy procedure ("ARP"),<sup>7</sup> and if so, they must exhaust the ARP.<sup>8</sup> This procedure is contained in 28 separate MDOC Directives ("DCD") which total 66 pages and have 14 appendices. DCDs 185-001 through 185-700 (effective April 1, 1993). The ARP requires the following steps:

1. A prisoner first files a request for informal resolution of the complaint with the appropriate staff member. Prison officials have 15 days from the date they receive the request to respond.
2. After receiving the response to a request for informal resolution, the prisoner must file a request for administrative remedy with the warden. The institution has five working days from the date it receives the request to "index" it. The

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<sup>7</sup> The ARP requirements do not apply to prisoners at the Patuxent Institution or to incidents not involving Division of Correction employees. Not even all complaints against DOC employees are subject to the administrative remedy procedure. Complaints about classification decisions, disciplinary proceedings, and parole proceedings are excluded.

<sup>8</sup> In *Robert Allen v. John Conte*, Civil No. L-85-1970 (D. Md.) (unpublished), the ARP was certified as being in substantial compliance with 42 U.S.C. §1997e and 28 C.F.R. §40.

warden then has thirty days from the date the request is indexed to respond and may request an additional ten days.

3. After receiving the warden's response the prisoner must file an appeal to the Commissioner of Correction. The Commissioner's office has five working days from the date it receives the appeal to index it. The Commissioner has twenty days from the date an appeal is indexed to respond.

A prisoner who wants to file a civil action against the MDOC or a MDOC employee grounded upon Maryland law must follow additional procedures before filing suit. The prisoner must first exhaust the ARP. Md. Regs. Code Tit. 12, §07.01.03D (1972, 1994) If the complaint involves a prison disciplinary proceeding, the appeal procedure must be exhausted, pursuant to MDOC Directives. Next, a complaint with the Inmate Grievance Office ("IGO") must be filed. *McCullough v. Wittner*, 314 Md. 602, 552 A. 2d 881 (1989).

The IGO has sixty days to perform an initial review to determine if the case should be dismissed without a hearing. Md. Ann. Code Art. 41, §4-102.1(d) (1957, 1993 Repl. Vol. and 1995 Supp.). If the complaint is not dismissed it is referred to the Maryland Office of Administrative Hearings. A prisoner is not allowed to use prehearing discovery, Md. Regs. Code Tit. 12, §07.01.08B, and can only call "such witnesses as the [Inmate Grievance] Office or an administrative law judge agrees may have relevant testimony to submit and as may be available at reasonable times." Md. Regs. Code Tit. 12, §07.01.08C(2). Although hearings are supposed to be held and decisions issued promptly, there are no actual limits on when a hearing will be held or a decision issued. If the administrative law judge finds the complaint to

be meritorious, the decision must then be reviewed by the Secretary of the Department within fifteen days of receipt. Md. Ann. Code., Art. 41, §4-102.1(e)(2)(1957, 1993 Repl. Vol. and 1995 Supp.).

If all of the applicable deadlines are met, it will take six months to a year for a prisoner to receive a final decision. The prisoner then has thirty days to file an appeal to the state circuit court of the jurisdiction in which he or she is incarcerated.

In addition to these procedures, which apply only to prisoners, anyone who has a claim against the State of Maryland, a state agency or a state employee must file notice with the Maryland State Treasurer before filing suit. Md State Gov't Code Ann., § 12-106(b) (1993 Repl. Vol. and 1995 Supp.).

When the prisoner's complaint involves inadequate medical care and the prisoner is seeking more than \$20,000.00 in damages, the prisoner must also follow the procedures contained in the Maryland Health Claims Arbitration Act, Md. Cts. & Jud. Proc. Code Ann., §3-2A-01 *et seq.* (1995 Repl. Vol.). Currently most health care in MDOC facilities is provided by private contractors so the prisoner is not required to exhaust the IGO and State Tort Claims Act procedures.<sup>9</sup> There are, however, a small group of health care providers employed directly by the MDOC. To

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<sup>9</sup> Despite the fact that most health care providers are not MDOC employees, prisoners are still required to exhaust the ARP before filing a constitutional claim based upon deliberate indifference to a serious medical need.

further complicate the prisoner's litigation decisions, three different health care companies provide health services at different prisons. For a Maryland prisoner, figuring out whom to sue in a medical claim and what procedures must first be exhausted requires a high degree of legal expertise.

Once the proper defendants have been identified, the question of where to sue must be addressed. In Maryland, original jurisdiction in a civil action may exist in either the state circuit or state district court depending upon the relief being sought and whether a jury trial is requested. *See*, Md. Cts. & Jud. Proc. Code Ann., §§ 4-401, 4-402 (1995 Repl. Vol.). In addition to the general rules on venue, *see, id.*, §6-201 *et seq.*, there are some circumstances in which prisoners must file in the jurisdiction where they are incarcerated. *See*, Md. Ann. Code Art. 41, §4-102.1(k)(1957, 1993 Repl. Vol. and 1995 Supp.)(appeals of IGO decisions).

This labyrinth of procedural requirements and time limitations is, moreover, formidable for even practiced attorneys, much less the unassisted prisoner. In jurisdictions such as Maryland where the *pro se* litigator is held to the same standards as attorneys, it is patently unjust to deprive prisoners of the basic tools of litigation - books they can read and understand and the advice and assistance of lawyers and trained legal assistants.

For prisoners who suffer from mental disabilities, the administrative barriers to access to the courts in Maryland noted above are insurmountable without assistance from persons trained in the law. Such inmates are unable to proceed successfully in even the simplest of cases. Illustrative, is the case of a prisoner designated herein as Mr.

Smith.<sup>10</sup> This inmate, because of his inability at times to conform his behavior, has found himself subject to disciplinary procedures and to the loss of good conduct credits. In fact, like many mentally troubled inmates, he has lost almost all of his good conduct credit and, despite his comparatively minor non-violent crime, will serve every day of his 18 month sentence in Supermax without parole or release on good conduct credits. Mr. Smith has been subjected to numerous disciplinary proceedings, known as adjustment hearings, held before MDOC hearing officers. Appeals from decisions of adjustment hearing officers must be filed with the IGO, not through the ARP. After each of his adverse adjustment decisions and loss of credit, Mr. Smith attempted to file an appeal, but due to ignorance of proper procedure, he filed, over and over again, appeals with the wrong body, the ARP coordinator. Each time Mr. Smith filed such an appeal, it was returned by the Warden with a written response informing him that his appeal is administratively dismissed because the ARP procedure is not the proper procedure for appealing an adjustment decision. Mr. Smith did not learn of the proper appeal procedure until he contacted PAP and was assisted in appealing those decisions which had not yet become time-barred.

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<sup>10</sup> PAP clients whose cases are not matters of public record are not identified by their true names in order to protect the attorney-client privilege.

## II. Illiterate and Ignorant Prisoners Must Have Legal Assistance In Order To Properly Review Issues Related To Complex Sentencing Calculations.

The complicated and arcane Maryland laws regarding computation of prisoners' sentences and related issues of credit for time spent in custody, parole eligibility, and diminution of confinement credits ("good time"), require that illiterate and ignorant prisoners have access to specialized legal services if they are to challenge MDOC miscalculations through habeas corpus petitions in federal and state courts.<sup>11</sup> Statutes governing whether a sentence is consecutive or concurrent are scattered throughout the Maryland Code. *See, e.g.*, Md. Ann. Code, Art. 27, §139 (1957, 1992 Repl. Vol. 1995 Supp.) (sentences for escape to be consecutive to any sentence being served at time of escape); Md. Ann. Code, Art. 27, §690C (1957, 1995 Supp.) (sentence computation consecutive to sentence for which the defendant is on parole). In addition to the various statutes there are numerous internal memoranda prepared by MDOC staff explaining how to handle specific situations. These documents are not routinely available to prisoners. PAP staff successfully challenged the former MDOC practice of running a sentence that was to be "consecutive to sentence now serving" to all of a prisoner's term of confinement. *Robinson v. Lee*, 317 Md 371, 564 A.2d 395 (1989). This decision led to a policy change that affected hundreds of prisoners. In individual instances PAP has successfully challenged the retroactive application of a change in a policy for determining the starting date of

<sup>11</sup> Since habeas corpus is civil in nature, PAP attempts to provide assistance and representation where the complaint has merit.

consecutive sentences. *Gregory Smith v. Eugene Nuth*, Circuit Court for Anne Arundel County, Case No. C-92-06659 (July 16, 1992) (Lerner, J.)

Parole eligibility is also complex. Many Maryland statutes require the imposition of a non-parolable sentence. *See, e.g.* Md. Ann. Code Art. 27, §36B(d); *id.* §286; *id.* §643B (1957, 1992 Repl. Vol. and 1995 Supp.) Otherwise, a prisoner becomes eligible after serving either 1/4 or 1/2 of the sentence, depending upon the offense and the date it was committed. Md. Ann. Code Art. 41, §4-516 (1957, 1993 Repl. Vol. and 1995 Cum. Supp.). Parole eligibility for defendants admitted to the Patuxent Institution is subject to the exceptions in Md. Ann. Code, Art. 31B, §11 (1993 Repl. Vol. and 1995 Supp.). PAP successfully challenged retroactive application of an amendment requiring that the Governor approve the parole from the Patuxent Institution of any prisoner serving a life sentence. *Gluckstern v. Sutton*, 319 Md. 634, 574 A.2d 898, *cert. denied*, 498 U.S. 950 (1990).

Most complicated of all is the calculation of diminution of confinement credits earned by prisoners. The number of credits a prisoner may earn varies for each institution, the date sentence was imposed and the offense. Md. Ann. Code, Art. 27, §§ 700 & 704A (1957, 1992 Repl. Vol. and 1995 Supp.). MDOC instructions for calculating credits are contained in its Commitment Procedures Manual which is several hundred pages long. PAP has successfully challenged policies denying diminution credits to prisoners serving sentences for contempt, *Harry Garrison v. Thomas Corcoran*, Circuit Court for Anne Arundel County, Case No. C-94-14093 (August 29, 1994) (Lerner, J.), and denying

diminution credits earned while in a local jail, *Ernest Johnson v. Sewall Smith*, Circuit Court for Baltimore City, Case No. 16803623 (February 14, 1994) (Smith, J.). In all of these cases the questions presented were simply too complicated for a *pro se* prisoner to proceed without legal assistance.

The extraordinary *pro se* odyssey of William Barnes further illustrates this problem, complicated in this instance by the nature of the federal system. With pen and paper supplied by MDOC, Mr. Barnes wrote to the courts. Without an attorney, however, his access proved far from meaningful and he remained illegally incarcerated for almost ten years.

Mr. Barnes was confined in penal institutions or mental health facilities starting in 1957 when, at the age of 16, he was sentenced to two years for larceny of an automobile. After sentencing, he was ordered evaluated by the Patuxent Institution under Maryland's "defective delinquent" law, former Md. Code, Art. 31B,<sup>12</sup> and was committed to Patuxent as a defective delinquent in 1958. He was recommitted in 1961 and again in 1964.<sup>13</sup> He was to remain under the jurisdiction of Patuxent until 1976. Along the way, while in prison, he received additional criminal sentences.

In 1976, in a habeas corpus proceeding, the United States District Court for the District of Maryland found Mr. Barnes'

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<sup>12</sup> See, *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972), for a discussion of former Art. 31B.

<sup>13</sup> See, *Barnes v. Director, Patuxent Institution*, 240 Md. 32, 212 A.2d 465 (1965); *Barnes v. Director, Patuxent Institution*, 227 Md. 641, 175 A.2d 20 (1961).

original two year sentence invalid under *Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971), (Baltimore City ordinance permitting 16 and 17 year old juveniles to be tried automatically as adults violated the Equal Protection Clause). Under the case of *Gee v. State*, 239 Md. 604, 212 A.2d 269 (1965), the vacation of the criminal conviction which formed the predicate for commitment as a defective delinquent entitled the prisoner to be released. Although *Long* allowed Maryland to retry Barnes, the authorities did not do so. Rather, they transferred him to the Maryland Penitentiary to begin service of the more recent sentences.

Certain of these sentences had been imposed concurrently and others were ordered served consecutively. MDOC allowed Barnes credit for time served from June 7, 1971, the date the first of the new criminal sentences was imposed, but refused to allow any credit for time served or "good time" earned before that date, even though incarceration after expiration of the original two year sentence in 1959 had been declared illegal.

Although having received some relief in federal court, Barnes believed, correctly, that he was entitled to credit for the time he served between 1959 and 1971. He continued to attempt, *pro se*, to gain this relief by filing further papers and appeals in the federal courts. His request for damages was rejected in *Barnes v. Maryland*, Civil No. M-75-1674, the companion to his federal habeas case. On appeal from both cases, the Fourth Circuit denied relief in unpublished *per curiam* opinions. In *Barnes v. Warden, Md. Penitentiary*, Civil No. M-78-1031, a habeas action, the federal district court ruled that federal law did not require that credit be

given a state prisoner under these circumstances. Barnes then attempted to obtain credit for time served since 1957 in a §1983 action in federal court. This claim was rejected on *res judicata* grounds in *Barnes v. Niles*, Civil No. M-84-559. In *Barnes v. Calhoun*, Civil No. H-84-3475, his claims were rejected as incomprehensible. In *Barnes v. Schaefer*, Civil No. S-87-2229, his claim was construed as one for damages only and again rejected on the basis of *res judicata*. *Barnes v. Maryland*, Civil No. S-87-3298, met a similar fate. The Fourth Circuit rejected each appeal and several original filings. Barnes fared no better in the Maryland courts. His numerous filings under the Maryland Post Conviction Procedure Act, Md. Ann. Code, Art. 27, §645A (1957, 1992 Repl. Vol. and 1995 Supp.), were rejected by both the Howard County and Baltimore City circuit courts. In a state habeas case filed in Baltimore City in 1978, his claims were rejected for want of ripeness.<sup>14</sup> In 1991, several petitions later, the Baltimore City circuit court rejected his claim as incomprehensible and unintelligible. Administrative claims filed with the IGO foundered for one reason or another. Appeals and original filings in the Maryland Court of Special Appeals and the Maryland Court of Appeals were dismissed.

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<sup>14</sup> In contrast to federal habeas corpus, see, *Peyton v. Rowe*, 391 U.S. 54 (1968), early Maryland cases hold that a habeas petition challenging an allegedly excessive sentence may not be adjudicated until the legal portion of the sentence had been served. See, e.g., *Roberts v. Warden, Maryland Penitentiary*, 206 Md. 246, 111 A.2d 597 (1955). While the soundness of this "prematurity" doctrine has been called into question by recent decisions of the Maryland Court of Appeals, the *Roberts* rule was applied to Barnes' petition.

After the decision in *Robinson v. Lee, supra*, MDOC calculated Barnes' term of confinement as an aggregate of 27 years, commencing in 1971. In 1992, PAP staff interviewed Barnes and realized that there was reason to investigate. While it was difficult to obtain records from the various courts because of the age of the proceedings, once the facts were known with certainty, Maryland law was relatively clear on the question. Md. Ann. Code, Art. 27, §638C(c) provides that a person who is serving multiple sentences, one of which is set aside, must receive credit against the remaining term for time served under the vacated conviction. The trial judge is to determine the credit at sentencing (or resentencing). *Id.* at (d). When Barnes' 1957 conviction was set aside in 1976, he was serving multiple sentences, both as a defective delinquent and also under the new convictions. He was, in fact, serving "multiple sentences, one of which [was] set aside as a result of direct or collateral attack. . . ." *Id.*, at (c). Since Barnes had never been retried on the 1957 charges, he had never been brought back to court so that proper credit could be allowed.

PAP filed a habeas petition in the Baltimore City circuit court. On this occasion, when served with the petition and supporting documents, MDOC agreed with the majority of Barnes' contentions and released him without filing an answer. With the "good time" attributable to his incarceration prior to 1971, which had not been allowed by the MDOC it is estimated that Barnes was illegally detained for almost a decade. Had it not been for the legal assistance he received, he would most likely still be incarcerated despite the numerous *pro se* complaints he filed in the courts. Since his

release, Mr. Barnes has lived a quiet, law-abiding life in Baltimore.

Mr. Barnes' experience belies Arizona's claim, Brief of Pet. at 14, that the combination of the rule of *Haines v. Kerner*, 404 U.S. 519 (1972), requiring a "liberal 'notice' standard for evaluating papers filed by *pro se* litigants, *id.* at 520, and 28 U.S.C. §1915(d), permitting courts to seek counsel for *pro se* litigants, acts to assure that truly meritorious prisoner claims, once they arrive at the court house, will receive a fair hearing. On the contrary, the experience of PAP is that prisoners are not accorded counsel by the federal courts until their cases have survived the voluminous "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment" filed in almost every case by the Maryland Attorney General's Office. Often, it is not until this juncture that the merits of a case are recognized, and counsel is sought by the court for the *pro se* prisoner.

### III. In State Courts, Pro Se Prisoners Face Daunting Procedural And Substantive Obstacles In Litigating Their Claims.

In Maryland courts the prisoner can take little solace from Petitioners' claim that either the courts or the law will save him from his ignorance or illiteracy. Many prisoner claims which invoke common law, the Maryland Constitution and law, as well as federal law, are properly asserted in state court and, in fact, some claims which implicate serious and fundamental rights, such as loss of parental rights, are without the jurisdiction of the federal courts. Nevertheless, the unschooled, unassisted prisoner litigant may fare even less well in the state system. Here there is no counterpart to

*Haines v. Kerner, supra.* Maryland law, to the contrary, holds the *pro se* litigant to the same standard as the opposing party's attorney for the reason that the rules "apply to laymen and lawyers alike." *Tretick v. Layman*, 95 Md. App. 62, 68, 619 A.2d 201, 204 (1993). "In short, the Maryland Rules of Procedure, the Rules of Evidence, the burdens of proof, production, and persuasion are *party-based*, not attorney-based. There are no separate rules for attorneys and for parties." *Id.* at 78, 619 A.2d at 209 (emphasis in the original). In *Tretick*, the *pro se* litigant's appeal was dismissed because of his failure to properly present his appeal and to preserve alleged errors for review. In some instances PAP has been able to assist the *pro se* inmate in overcoming this burden. *See, e.g., Torbit v. State of Maryland*, 102 Md. App. 530, 650 A.2d 311 (1994). In *Torbit* PAP represented a prisoner who had been refused a waiver of filing fees in his *pro se* petition for name change for religious reasons. The state's appellate court reversed the lower court's policy of routinely denying fee waivers in such cases without providing a statement of reasons. With the cooperation of the administrative judge, PAP has now developed a packet of forms, affidavits, notifications to interested parties, and other materials for use by the court in prisoner name change cases.

Finally, the Maryland prisoner litigator must obtain representation or assistance of counsel on his or her own. Under Maryland law there is no provision comparable to that of §1915(d) empowering a court to seek counsel for a *pro se* litigant's meritorious case. Prisoners' motions for appointment of counsel addressed to state courts go unanswered, or are answered in the negative.

PAP is working with a *pro bono* umbrella organization and the Maryland courts to encourage judges faced with meritorious *pro se* claimants to call upon volunteer organizations to provide counsel on short notice. For the prisoner litigant who has not found the way to PAP, this means he or she must, in the first instance, satisfy a court that the cause is meritorious, and then meet volunteer counsel for the first time, in the lock-up, on the day of trial.

#### **IV. Without Legal Assistance, Illiterate and Ignorant Prisoners Are At A Severe Disadvantage Compared To "Ordinary Residents".**

Petitioners, without foundation, assert that the relief ordered by the Arizona district court provides to prisoners access far exceeding that available to "ordinary residents". Pet. Brief at 11. An examination of the resources available to the "ordinary resident" not only serves to dispel this popular misconception but also to point up the impediments to meaningful access inherent in incarceration.

The 1993/94 Directory of Legal Aid and Defender Offices lists 108 pages of civil legal aid and 25 pages of special needs organizations which provide free legal advice and representation for eligible poor people living in every state in the nation. Also readily available to persons living in the community who do not have the ability to hire legal counsel are the facilities of the state and federal court clerks offices. There the clerks routinely advise *pro se* litigants on filing procedures, distribute legal forms utilized in the jurisdiction, provide sample pleadings, and give other non-legal advice.

Maryland public libraries stock large collections of law books and other reference materials and will obtain those items not available on their shelves through inter-library exchange programs. Law school libraries as well as city, county and state bar libraries are open to *pro se* litigants.

In addition to these resources available to the non-incarcerated *pro se* litigant, Maryland courts have instituted a *pro se* divorce program which provides: 1) domestic pleading forms on request to *pro se* litigants; 2) lawyers and law students available within urban courthouses to advise litigants in completing the forms; 3) a state-wide hotline staffed by lawyers; and 4) program oversight by judges and masters.

In Maryland a growing number of community groups and legal organizations provide an extensive variety of legal services to all segments of the resident poor population. A compendium published by the People's Pro Bono Action Center and the Maryland State Bar Association lists over 70 legal services organizations, supported by federal and state agencies, religious organizations, private foundation grants, and private contributions.

In addition to the Bureau, which provides general civil legal services throughout the state, several of these smaller organizations offer legal services in specialized areas of expertise to such groups as the physically and mentally handicapped, the homeless, abused and neglected children, battered spouses, homeowners threatened with loss of their homes, tenants with landlord-tenant problems, children in need of special education services, immigrants, mothers in need of child support, persons with AIDS, and groups

suffering systemic harm through government or private action. The Maryland Volunteer Lawyers Service matches poor clients to lawyers who serve *pro bono* or at reduced rates. The two Maryland law schools have active student clinics which provide legal services in the areas of health law, family law, mediation of legal problems, environmental law, civil rights and constitutional law.

None of these services is available to inmates of the state's prisons (or even to persons on home detention or work release who are not granted permission to extend their trips in the community to court houses or lawyers' offices). Lawyer referral and *pro bono* programs are unable to obtain representation for prisoners. Only one group other than PAP provides legal assistance to Maryland prisoners with uncontested family law issues. The isolated prisoner claimant is not on an equal footing with anyone litigating outside of prison, and in order that those handicapped by incarceration as well as by ignorance and illiteracy achieve at least meaningful access to courts and administrative agencies they must be accorded the assistance of legally trained advisers.

### CONCLUSION

In support of the position of the Respondents, *amicus* asks that the judgement of the Court of Appeals be affirmed.

Respectfully Submitted,

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